LIABILITY OF A TELEGRAPH COMPANY FOR TRANSMITTING A DEFAMATORY MESSAGE

Strange as it may seem, there are less than a dozen decisions to be found in all the American and English reports involving the liability of a telegraph company for transmitting a defamatory message.[1] An examination of standard texts has revealed little more than a mere reference to the decisions without *quaere* or comment, and the reader is left with the impression that the law of these cases is no different from that applied in defamation cases generally. The writer believes that such is not the case. Certainly the views expressed in the few cases which have arisen, while not altogether harmonious, indicate a tendency on the part of the courts to depart from accepted doctrine. Whether this departure is finally to become settled law, or is to be limited, or overruled, remains to be seen. But the dearth of discussion of a probable development in an important subject has prompted the preparation of these pages.

A recent decision of the Supreme Court of Minnesota, *Paton* v. *Great Northwestern Telegraph Co.*,[2] suggests the main theme of this article. In that case the defendant received from one Wilson and transmitted to the plaintiff's husband a telegram which read as follows:

"Wife caught in adultery with Cox. Come at once. Answer.
(Signed) C. WILSON."

Upon the trial of an action for libel brought by the wife against the telegraph company, it was admitted that the charge was false, and that the motive of C. Wilson in sending the message was purely malicious, but the telegraph company defended upon the ground of privilege. The uncontroverted evidence showed, according to the Supreme Court, that the "defendant received this message

[1] Whitfield *v.* South Eastern Railway (1858) Ellis B. & E. 115; Dominion Telegraph Co. *v.* Silver (1881) 10 Can. S. C. 238; Archambault *v.* Great N. W. Tel. Co. (1886) 14 Quebec L. R. 8; Great N. W. Tel. Co. *v.* Archambault (1886) 30 Lower Can. Jur. 221; Peterson *v.* Western Union Tel. Co. (1896) 65 Minn. 18, 67 N. W. 646; (1898) 72 Minn. 41, 74 N. W. 1022; (1899) 75 Minn. 368, 77 N. W. 985; Nye *v.* Western Union Tel. Co. (C. C. 1900) 104 Fed. 628; Stockman *v.* Western Union Tel. Co. (Kan. 1900) 63 Pac. 658; Western Union Tel. Co. *v.* Cashman (C. C. A. 1906) 149 Fed. 367; Grisham *v.* Telegraph Co. (1911) 238 Mo. 480, 142 S. W. 271; Paton *v.* Great N. W. Tel. Co. (Minn. 1919) 170 N. W. 511. See also Monson *v.* Lathrop (1897) 96 Wis. 386, 71 N. W. 596.

[2] (1919) 170 N. W. 511.

from an utter stranger. It was glaringly defamatory on its face. Defendant transmitted it without any knowledge as to its truth or falsity, without any knowledge as to whether the person who presented it was or was not a person who was entitled to send it as a privileged communication, and without making any inquiry of any kind." The trial judge submitted to the jury the question whether the communication was privileged, and instructed them that "it was privileged if the operator acted carefully and in good faith, but was not privileged if he was negligent or wanting in good faith, in sending it." A verdict and judgment for the plaintiff was affirmed on appeal, the Supreme Court stating: "The facts and circumstances disclosed, warranted the submission of this question to the jury, and their verdict establishes that the message was not privileged." What the verdict really establishes is that the operator in transmitting the message under the circumstances was either "negligent" or "wanting in good faith." Whether, under a given state of facts, the occasion is privileged is a question of law to be decided by the court.[3] The trial judge told the jury that if the operator acted carefully and in good faith the publication was privileged. Is this true? The affirmance by the Supreme Court of the judgment for the plaintiff does not decide this question, because if it is assumed that under the admitted facts the defendant was liable as a matter of law, irrespective of its care and good faith, and the statement of the trial judge was wrong, the charge was not prejudicial to the defendant and, therefore, was a harmless error. But suppose that under these instructions the jury had returned a verdict for the defendant, would the plaintiff have been entitled to a new trial?

On the other hand, is the actual decision in the case correct? Upon the evidence should the case have been submitted to the jury at all, or should the judge have directed a verdict for the defendant? If there was a question for the consideration of the jury, were the instructions that the communication was not privileged if the operator was "negligent *or* wanting in good faith," prejudicial to the defendant?

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[3]"The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but, when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion." Per Lord Esher, M. R., in Hebditch *v.* MacIlwaine (1894) 2 Q. B. 54, 58. This is a good statement of the rule both in England and America. Odgers, Libel and Slander (5th ed.) 229; Newell, Slander and Libel (3rd ed.) 480. For a collection of cases in point see note in 10 Am. & Eng. Anno. Cas. 1152.

Before attempting to answer these questions it may be well to dispose of certain preliminary questions.

I Publication

The idea underlying the civil wrongs of libel and slander is that the defendant by his conduct has caused injury to the plaintiff by affecting his reputation.[4] Since a man's reputation is measured by the estimation in which he is held by others, it follows that his reputation is affected by defamatory representations concerning him only when made known to another,—hence the familiar rule that in every action for libel or slander the plaintiff must prove a publication by the defendant, or by one for whose conduct the defendant is responsible. Accordingly if *A* writes a libelous letter about *B* the contents of which are not made known to a third person, or makes defamatory remarks about *B* in a foreign tongue which the hearer does not understand, *A* is not liable to *B* because *A* has not by his conduct caused to be made known the defamatory matter. There is said to be no publication in these cases.[5] But suppose that after writing the libelous letter, *A* carefully locks it in his desk, and *C* wrongfully opens the desk and reads the letter, or shows it to *D*. Here the resulting injury to *B* is actually caused by the combined conduct of *A* and *C*. But for the purpose of fixing responsibility the law regards the conduct of *C*, and not the conduct of *A*, as the cause of *B*'s injury, *i. e.*, *A*'s act is not a legal cause. Consequently there is said to be no publication by *A*.[6] If, however, *A* had contemplated that *C* would see the letter, or was negligent in permitting it to come into *C*'s hands, *A*'s conduct would be considered the legal cause and the courts would declare there was a publication by *A*.[7] Publication, therefore, as used by the

[4]See the illuminating article on "The History and Theory of The Law of Defamation" by Van Vechten Veeder, 3 Columbia Law Rev. 546, 4 Columbia Law Rev. 33.

[5]Clutterbuck *v.* Chaffers (1816) 1 Stark. 471; Lyle *v.* Clason (N. Y. 1804) 1 Caines 581; Weir *v.* Hoss & Wife (1844) 6 Ala. 881; McIntosh *v.* Matherly (Ky. 1844) 9 B. Mon. 119; Spaits *v.* Poundstone (1882) 87 Ind. 522; State *v.* Syphrett (1887) 27 S. C. 29, 2 S. E. 624; Yarnock *v.* Mitchell (1890) 43 Fed. 428; Wilcox *v.* Moon (1892) 64 Vt. 450, 24 Atl. 244; Sylvis *v.* Miller (1895) 96 Tenn. 94, 33 S. W. 921; Shepard *v.* Lamphier (1914) 146 N. Y. Supp. 745; Desmond *v.* Brown (1871) 33 Iowa 13.

[6]Sharp *v.* Skues (1909) 25 T. L. R. 336; Huth *v.* Huth [1915] 3 K. B. 32; Powell *v.* Gelston [1916] 2 K. B. 615, 17 Columbia Law Rev. 170; Roberts *v.* English Mfg. Co. (1908) 155 Ala. 414, 46 So. 752.

[7]Delacroix *v.* Thevenot (1817) 2 Stark. 56; Rumney *v.* Worthley (1904) 186 Mass. 144, 71 N. E. 316; Shepheard *v.* Whitaker (1875) 10 C. P. 502; Fox *v.* Broderick (1864) 14 Ir. C. L. 453.

courts, requires not only that the defendant's conduct, or the conduct of another for which the defendant is responsible, be an actual cause, but also a legal cause of making known the defamatory matter to a third person. However, notwithstanding that *A*'s conduct is the legal cause of making known the defamatory matter and there is, therefore, a publication by *A*, the law sometimes excuses *A* because of the particular circumstances under which the matter is communicated. Such occasions are commonly called privileged occasions. For example, if *A* in good faith tells his partner *B* that *C* is stealing money from the firm, *A* is not responsible although the charge is false.[8] Here *A*'s conduct is both the actual and legal cause of *C*'s injury and, therefore, there is a publication by *A*. That there is a publication by *A* is proved by the fact that were *B* not *A*'s partner, *A* would be responsible to *C*, whereas if there were no publication the fact that *B* was not *A*'s partner would not render *A* liable. It is quite important that the distinction between "no publication" and "privileged publication" be kept clearly in mind. True it is that there is no responsibility in either case, but the consequences of confusing them may be serious. Thus, in every case of conditional privilege, proof of malice defeats the privilege, and the plaintiff recovers.[9] But if there is no publication the defendant is never responsible, and proof of malice avails the plaintiff nothing.[10]

It is, therefore, the opinion of the writer that the problems under consideration will be materially simplified by first ascertaining under what circumstances there is a publication by the telegraph company before inquiring as to when the publication is privileged.

If *A* communicates in writing to a telegraph operator in New York a message addressed to *B* in Washington, which message contains false and obviously defamatory statements about *C*, there is a publication of a libel to the operator by *A*, and *A* is liable to *C*[11] unless the occasion is privileged.[12] But merely receiving the message from *A* does not render the operator or the company liable. Reading or listening to defamatory statements about another, how-

[8]Klinck *v.* Colby (1871) 46 N. Y. 427; Odgers, Libel and Slander (5th ed.) 280; Newell, Slander and Libel (3rd ed.) § 623.

[9]Odgers, *op. cit.*, 228.

[10]See cases cited footnote 5, *supra*.

[11]Williamson *v.* Freer (1874) L. R. 9 C. P. 393; Monson *v.* Lathrop (1897) 96 Wis. 386, 71 N. W. 596; Robinson *v.* Robinson (1897) 13 T. L. R. 564.

[12]Ashcroft *v.* Hammond (1910) 197 N. Y. 488, 90 N. E. 1117.

ever reprehensible, is not a tort. To render the company liable there must be a publication of the message to some third person. If the message is transmitted to *B*, clearly there is a publication to *B* for which the company is liable to *C*[13] unless the publication is privileged.[14] The fact that the words are published as the words of *A* is no excuse.[15] Assume, however, that the message is addressed and transmitted to *C* the person defamed. Is this a publication by the company? The communication to *C* is not a publication within the legal meaning of that term.[16] But when the operator in New York flashes the message to the operator in Washington there is a publication by the first operator to the second operator.[17] Consequently the sending operator would be liable to *C*, in the absence of privilege, and if the operator was acting within the scope of his employment, the corporation should not escape the consequences of

[13]Whitfield *v.* Southeastern Ry. (1858) Ellis B. & E. 115; Dominion Tel. Co. *v.* Silver (1881) 10 Can. S. C. 238; Great N. W. Tel. Co. *v.* Archambault (1886) 30 Lower Can. Jur. 221.

[14]It seems obvious that if A is privileged to use the telegraph company as an agency for communicating the message to B as in Ashcroft *v.* Hammond (1910) 197 N. Y. 488, 90 N. E. 1117, the telegraph company is likewise privileged to transmit the message to B. See Youmans *v.* Smith (1897) 153 N. Y. 214, 47 N. E. 265. Whether the telegraph company may be immune to liability when the sender of the message is not privileged to send it is the main problem to be discussed in this article.

[15]Although at one time repeating a defamatory statement giving the name of the author was justifiable, Northampton's Case (1613) 12 Co. Rep. *132, the doctrine was repudiated as to libel, in De Crespingy *v.* Wellesley (1829) 5 Bing. 392, and Tidman *v.* Ainslie (1854) 10 Ex. 63, and as to slander, in McPherson *v.* Daniels (1829) 10 B. & C. 263, and it is settled law to-day that to quote another's defamatory statement is actionable, unless the occasion is privileged. See Odgers, Libel and Slander (5th ed.) 172-5, 394; Newell, Slander and Libel (3rd ed.) 424-433.

[16]Western Union Tel. Co. *v.* Cashman (C. C. A. 1906) 149 Fed. 367. While at common law the publication of a libel to the person defamed would sustain an indictment on the theory that such an act would tend to a breach of the peace, Rex *v.* Burdett (1820) 4 B. & Ald. 95, it was not the basis of a civil action, Clutterbuck *v.* Chaffers (1816) 1 Stark. 471, because the civil action is founded upon an actual or probable injury to the plaintiff's reputation. "No such injury is done when the words are uttered only to the person concerning whom they were spoken, no one else being present or within hearing. It is damage done to character in the opinion of other men, and not in a party's self-estimation, which constitutes the material element in an action for verbal slander. Even in a civil action for libel, evidence that the defendant wrote and sent a sealed letter to the plaintiff, containing defamatory matter, was held insufficient proof of publication although it would be otherwise in an indictment for libel, because such writings tend directly to a breach of the peace." Per Bigelow, J., in Sheffill *v.* Van Deusen (Mass. 1859) 13 Gray 304. In Scotland no publication to a third person is necessary. See Odgers, *op. cit.* 157.

[17]Peterson *v.* Western Union Tel. Co. (1896) 65 Minn. 18, 67 N. W. 646; (1898) 72 Minn. 41, 74 N. W. 1022; (1899) 75 Minn. 368, 77 N. W. 985.

respondeat superior.[18] However, in *Owen* v. *Ogilvie Publishing Co.*,[19] which was an action for libel brought against a corporation for a letter sent by its general manager to the plaintiff accusing the latter of theft from the company's cash drawer, the only publication charged was the dictation of the letter by the manager to a stenographer also employed by the corporation. The court rested its decision for the defendant upon the following ground:

"The law is elementary that there can be no libel without a publication of the libelous matter. We may assume that this letter was libelous. Was there a publication of it by the corporation, within the meaning of the law? Ordinarily, when a letter is written and delivered to a third person, with the intent and expectation that it shall be read by such person, and it is actually read, the publication is complete. (*Youmans* v. *Smith,* 153 N. Y. 214.) Has such rule application to the facts of this case? The letter was dictated to the stenographer, and was by her copied out, was signed by the manager, was then enclosed in an envelope, and sent by mail to the address of the plaintiff. It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and

[18]"The old doctrine that a corporation having no mind cannot be liable for acts of agents involving malice, has been completely exploded in modern jurisprudence. While a corporation is non-personal in its formal legal entity, it represents natural persons and must necessarily perform its duties through natural persons as agents, hence must spring the correlative responsibility for the acts of its agents within the scope of their employment." Per Jones, J. in Hypes *v.* Southern R. R. (1909) 82 S. C. 315, 64 S. E. 395. Accordingly it is well settled to-day both in England and America that a corporation is responsible for a libel published by its servant in the course of his duties though in violation of instructions. Citizens Life Assur. Co. Ltd. *v.* Brown [1904] A. C. 423; Fogg *v.* Boston & Lowell R. R. (1899) 148 Mass. 513; Odgers, *op. cit.*, 436. Some courts, however, have held that a corporation is not responsible for slander uttered by its servant unless it is expressly authorized or ratified. Jackson *v.* Atlantic etc. R. R. (1911) 8 Ga. App. 495, 69 S. E. 919; McIntyre *v.* Cudahy Packing Co. (1913) 179 Ala. 404, 60 So. 848; Stewart Dry Goods Co. *v.* Heuchtker (1912) 148 Ky. 228, 146 S. W. 423; Sawyer *v.* Norfolk & Southern R. R. (1906) 142 N. C. 1, 54 S. E. 793; see 11 Columbia Law Rev. 371. There is no rational basis for this distinction between liability for libel and for slander, and the trend of recent decisions is to make the corporation equally responsible for slander and for libel. Empire Cream Separator Co. *v.* De Laval Dairy Supply Co. (1907) 75 N. J. L. 207, 67 Atl. 711; Kharas *v.* Collier, Inc. (1916) 171 App. Div. 388, 157 N. Y. Supp. 410; Fensky *v.* Maryland Casualty Co. (1915) 264 Mo. 154, 174 S. W. 416; Comerford *v.* West End Street Ry. (1895) 164 Mass. 13, 41 N. E. 59; Rivers *v.* Yazoo & M. V. R. R. (1907) 90 Miss. 196, 43 So. 471; Grand Union Tea Co. *v.* Lord (C. C. A. 1916) 231 Fed. 390; Hypes *v.* Southern R. R., *supra;* Cotton *v.* Fisheries Products Co. (N. C. 1919) 97 S. E. 712. For a collection of cases see notes 9 Am. & Eng. Ann. Cas. 443; 17 Am. & Eng. Ann. Cas. 622; Ann. Cas. 1917D, 967.

[19](1898) 32 App. Div. 465, 53 N. Y. Supp. 1033.

servant, and the letter be held not to be privileged. Such, however, was not the relation of these persons; they were both employed by a common master, and were engaged in the performance of duties which their respective employments required. Under such circumstances we do not think that the stenographer is to be regarded as a third person in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation. . . . Under such conditions, we think the dictation, copying and mailing are to be treated as only one act of the corporation; and as the two servants were required to participate in it, there was no publication of the letter, in the sense in which that term is understood, by delivering to and reading by a third person. There was in fact but one act by the corporation, and those engaged in the performance of it are not to be regarded as third parties, but as common servants engaged in the act."[20]

Applying the same reasoning to the case where the operator in New York receives from *A* and transmits to the operator in Washington a message defaming *C*, which message is delivered by the Washington operator to *C*, the telegraph company would under no circumstances be responsible, since as to it no publication to a third person could be shown,—a result not supported by the cases.[21]

It is submitted that in *Owen* v. *Ogilvie Publishing Co.* the court confused "no publication" and "privileged publication." As previously pointed out, "publication" is a word of art to describe those circumstances under which the defendant's conduct, or the conduct of another for which the defendant is responsible, is the legal cause of making known the defamatory matter to a third person. But even though there be a publication, still there may be no liability because under the circumstances the publication is legalized, that is, excused, or privileged. So, it may be desirable to give the manager of a corporation the privilege of publishing to another employee of the corporation as an agency for communicating a message defamatory of another when the message concerns the business of the company and is communicated in good faith,[22] and yet quite undesirable to extend this privilege to cases of messages not necessary to protect the company's interests, or messages prompted by malice.[23] In both cases there is a publication, but in

[20] *Ibid.*, at p. 466.

[21] Peterson *v.* Western Union Tel. Co. (1896) 65 Minn. 18, 67 N. W. 646; (1898) 72 Minn. 41, 74 N. W. 1022; (1899) 75 Minn. 368, 77 N. W. 985. See Monson *v.* Lathrop (1897) 96 Wis. 386, 71 N. W. 596.

[22] Edmondson *v.* Birch & Co. [1907] 1 K. B. 371; Bohlinger *v.* Germania Life Ins. Co. (1911) 100 Ark. 477, 140 S. W. 257.

[23] Sun Life Assur. Co. *v.* Bailey (1903) 101 Va. 443, 44 S. E. 692.

the former it is privileged; in the latter it is not. Accordingly the publication is actionable in the one instance but excusable in the other. Certainly in *Owen* v. *Ogilvie Publishing Co.,* there was a publication by the manager to the stenographer in the sense that the manager by his voluntary act legally caused to be made known to the stenographer the defamatory matter.[24] This is not denied by the court, but the court declared there was no publication by the corporation. But there can never be a publication by a corporation except in the sense that the corporation is responsible for a publication by its agent or servant. In every case where it is sought to charge a corporation with liability for defamation there are two questions: *First,* has the tort been committed by some agent or servant of the corporation? *Second,* assuming the first question is answered in the affirmative, is the corporation also responsible? Whether there has been a publication is only involved in answering the first question, because if there has been no publication by an agent or servant of the corporation, no tort has been committed. If there has been a publication by an agent or servant of the corporation, then the question may arise whether the publication was privileged, because if it was privileged there is still no tort. But assume there has been a publication by an agent or servant of the corporation, and assume the publication was not privileged; a tort has been committed by the agent or servant and the second question arises. Is the corporation also responsible? The answer to this question depends solely upon the principles of agency or master and servant and really does not in any way involve the question of publication. Thus, to say there is a publication by the manager but no publication by the corporation is but a confusing way of stating that the corporation is not liable for a publication by its manager because under the circumstances either the publication was privileged and, therefore, no tort has been committed, or else the manager's act was not sufficiently within the scope of his employment to render the corporation responsible according to the principles of agency or master and servant. To state, as did the court, that the publication by the manager to the stenographer was not a publication by the corporation to a third person, is apt to lead to the erroneous conclusion that the corporation is immune from liability irrespective of the subject matter of the message or the

[24]That there was a publication is demonstrable by assuming the manager was actuated by malice in dictating the letter. Would anyone question that the manager would be liable to the plaintiff? Certainly he would not be liable if there were no publication.

motive of the manager in communicating it, even though the manager was acting within the scope of his employment; a position which the writer does not believe the New York Court of Appeals would take.[25] Since, however, the decision in *Owen* v. *Ogilvie Publishing Co.* has been adopted bodily by two courts without qualification or explanation,[26] and the importance of distinguishing between *no publication* and *privileged publication* has often been overlooked by courts,[27] it would seem that the question deserves more than a mere cursory examination.

In *Pullman and another* v. *Hill & Co.*[28] the managing director of the defendant company dictated to his stenographer a letter to the plaintiffs' firm accusing the plaintiffs of obtaining money from the company by false pretenses. The letter was written by the stenographer, signed by the manager, and, having been press-copied by an office-boy, was sent by post in an envelope addressed to the plaintiffs' firm. The letter was opened by a clerk of the plaintiffs' firm in the ordinary course of business and was read by two other clerks. In an action brought against the company for libel, two of the questions before the court were (1) whether the communication to the stenographer was a publication, and (2) if so, whether it was privileged. With reference to the first question the court said:

"What is the meaning of 'publication'? The making known

[25]See Kharas *v.* Collier, Inc. (1916) 171 App. Div. 388, 157 N. Y. Supp. 410.

[26]Central of Georgia Ry. *v.* Jones (1916) 18 Ga. App. 414, 89 S. E. 429. "Where an officer of a corporation, in the prosecution of its business, dictates to his stenographer a letter, directed and mailed to another agent of the corporation, charging therein the commission of a crime by a third person, and authorizing an investigation of the criminal charge, all being employed by the same corporation and being in the performance of their duties, the stenographer and the agent to whom the letter is mailed are not to be regarded as third persons, in the sense that the dictating and mailing of the letter, the stenographer's knowledge of it, and their reading of it, constitute a publication of a libel. This court will follow the rule laid down in Owen *v.* Ogilvie Pub. Co. (1898) 32 App. Div. 465, 53 N. Y. Supp. 1033." *Accord,* Prins *v.* Holland-North America Mtge. Co. (Wash. 1919) 181 Pac. 680. See 5 Cornell Law Quart. 84.

[27]Harper *v.* Hamilton Retail Grocer's Ass'n. (1900) 37 Can. L. J. 31. Morgan *v.* Wallis (1917) 33 T. L. R. 495. In Puterbaugh *v.* Gold Medal Mfg. Co. (1904) 7 Ont. L. R. 582, the court held the corporation liable, but Moss, C. J. O. remarked, "There is to my mind much force in the statement of the learned Judge who delivered the judgment of the Court in Owen *v.* Ogilvie, 32 App. Div. at page 467." In Cartwright-Caps Co. *v.* Fischel & Kaufman (1917) 113 Miss. 359, 362, 74 So. 278, the Court placed its decision on both grounds: "Under the facts of this case we think that the letters were privileged, and that there was not, in a legal sense, a publication of the letters in question." See 5 Georgetown Law Journal 51.

[28][1891] 1 Q. B. 524.

the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. . . . If the writer of a letter shews it to his clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is shewing it to a third person; the writer cannot say to the person to whom it is addressed, 'I have shown it to you and to no one else.' I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it. . . . There was, therefore, in this case a publication to the typewriter."[29]

The court then decided that the publication to the stenographer was not privileged.

In *Edmondson v. Birch & Co., Limited and Horner,*[30] an English decision frequently cited in opposition to *Pullman* v. *Hill & Co.,* the defendant Horner, as managing director of the defendant company, and for and on behalf of that company, dictated to a stenographer in the defendant company's employ, a letter addressed to the plaintiff's employer containing defamatory statements concerning the plaintiff. The letter was written by the stenographer, signed by Horner, and sent to the plaintiff's employer. Upon the trial of an action for libel brought against the company and Horner, the lower court held that the communication to the plaintiff's employer was made on a privileged occasion and that there was no evidence of malice on the part of the defendants to rebut the privilege; but the court held, on the authority of *Pullman* v. *Hill & Co.,* that there had been a publication of the defamatory matter to the defendant company's clerks which was not covered by the privileged occasion, and permitted the jury to assess damages in respect of that publication and judgment was entered for the plaintiff. The Court of Appeal reversed the judgment and entered judgment for the defendants, not because the publication to the stenographer was not a publication "by the defendant company to a third person," but solely on the ground that under the circumstances the publication to the stenographer was privileged.[31] The decision of the Court of Appeal was based

[29] *Ibid.,* at p. 527.

[30] [1907] 1 K. B. 371.

[31] The following excerpts from the opinions of the three judges make the ground of the decision clear. On page 370 Collins, M. R., declared: "The result of the two cases to which I have alluded, taken together,

largely upon a previous decision of that court in *Boxsius* v. *Goblet Freres*[32] holding that the dictation by a lawyer to his stenographer of a letter in behalf of a client and sent to the plaintiff was a privileged publication, because the communication to the stenographer was a reasonable and usual method of transmitting such messages. Thus, while the decision in *Pullman* v. *Hill & Co.* on the point of privilege has been greatly weakened, if not overruled, by subsequent English decisions,[33] its authority on the question of publication has never been doubted by an English court.[34] Furthermore, it has been followed in a number of American[35] and Canadian cases.[36]

The same reasoning employed by the court in *Owen* v. *Ogilvie Publishing Co.* was used by counsel for the defendant without success in the case of *Bacon* v. *Michigan Central R. R. Co.*[37] The

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appears to me to be that, where there is a duty, whether of perfect or imperfect obligation, as between two persons, which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons, where that is reasonable and in the ordinary course of business; and if so, it will not destroy the privilege." On page 381, Cozens-Hardy, L. J., said: "I am of the same opinion, and I only wish to add this. I think that if we were to accede to the argument for the plaintiff, we should in effect be destroying the defence of privilege in cases of this kind, in which limited companies and large mercantile firms are concerned." On page 382 Fletcher Moulton, L. J., remarked: "I agree. In my opinion the law on the subject, as laid down in the cases, amounts to this: If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business."

[32][1894] 1 Q. B. 842.

[33]This point will be discussed later in this article.

[34]In a recent decision by the King's Bench, Morgan and another *v.* Wallis (1917) 33 T. L. R. 495, the court said that the mere dictation of a bill of costs by a solicitor to a typist, as a matter of office routine, was not a publication. However, the defendant had pleaded privilege, and the decision was expressly based on the previous decision of the Court of Appeal in Boxsius *v.* Goblet Freres [1894] 1 Q. B. 842. An examination of the Boxsius case reveals that the Court of Appeal decided for the defendant on the ground of privilege. Furthermore, this was the interpretation of the Boxsius case adopted in the later case of Edmondson *v.* Birch & Co. [1907] 1 K. B. 371, by the Court of Appeal. Therefore, the case of Morgan *v.* Wallis, *supra,* cannot be relied upon as changing the English law.

[35]Gambrill *v.* Schooley (1901) 93 Md. 48, 48 Atl. 730; Sun Life Assur. Co. *v.* Bailey (1903) 101 Va. 443, 44 S. E. 692; Ferdon *v.* Dickens (1909) 161 Ala. 181, 49 So. 888.

[36]Puterbaugh *v.* Gold Medal Mfg. Co. (1904) 7 Ont. L. R. 582; Moran *v.* O'Regan (1907) 38 N. B. Rep. 189.

[37](1884) 55 Mich 225, 21 N. W. 324.

facts were that the superintendent of the defendant railroad company had sent to other district superintendents of the company a discharge list to guide them in employing servants for the company. The plaintiff's name appeared on the list as having been discharged for stealing. In an action brought against the railroad company for libel the defendant pleaded the general issue, thereby denying a publication, and did not interpose an affirmative defense of privilege. The trial judge ruled that there was no evidence of a publication by the corporation and directed a verdict for the defendant. The Supreme Court reversed the judgment and granted a new trial, the pith of the decision being contained in the following passage:

"But the argument is and the circuit judge so held, that the transmission of the libel from the superintendent to the twenty-nine heads of department in Michigan, Indiana and Illinois was only passing the libel from one agent of defendant to another agent of defendant, and it had never reached the hands or knowledge of a third person, but in fact remained in the possession of the composer.

"This argument is wholly untenable. If a person compose a libel and send it to his agent, to be read by him, and it reaches its destination and is read by such agent, it is a sufficient publication to support the action. There are in this country railroad and telegraph corporations whose lines extend through many states and who employ many thousand agents. There are a great number of insurance companies employing agencies in several states. Can it be possible that these corporations possess an immunity to defame any person by sending such libel to every agent in their employment? Why should they possess this immunity more than an individual employing a large number of agents? Why should it be held a publication in one case and not in the other? In my opinion every agent to whom this discharge list was delivered was a third person respecting this corporation and the plaintiff, and it constituted a publication of the libel."[38]

It is submitted, therefore, that the statement in *Owen* v. *Ogilvie Publishing Co.* that there was no publication by the corporation to a third person must be interpreted to mean that the particular publication was not actionable because it was privileged, or else the case stands in opposition to both reason and authority.

If the foregoing analysis is correct it follows that where a telegraph company through its duly authorized agent receives from *A* and transmits to *C* a message defaming *C*, there is a

[38] *Ibid.*, at p. 228. *Contra,* Prins *v.* Holland-North America Mtge. Co. (Wash. 1919) 181 Pac. 680.

publication by the sending operator to the receiving operator and, in the absence of privilege, the company is also liable.[39]

Is the publication one of slander or libel? The consequences of the answer to this question are important. Slander is not actionable, except in a limited number of cases, without proof of actual damage.[40] All libels are actionable without proof of damage.[41] Furthermore, according to the decisions in several

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[39]Peterson *v.* Western Union Tel. Co. (1896) 65 Minn. 18, 67 N. W. 646; (1898) 72 Minn. 41, 74 N. W. 1022; (1899) 75 Minn. 368, 77 N. W. 985; see Monson *v.* Lathrop (1897) 96 Wis. 386, 71 N. W. 596.

[40]Pollard *v.* Lyon (1875) 91 U. S. 225. Odgers, Libel and Slander (5th ed.) 2, 377. The cases of slander which are actionable without proof of special damage, or as commonly said are actionable *per se,* are generally divided into four groups: (1) Words which impute to the plaintiff the commission of a crime, Webb *v.* Beavan (1883) 11 Q. B. D. 609, which according to many cases, must involve moral turpitude or subject the offender to infamous punishment. Brooker *v.* Coffin (N. Y. 1809) 5 Johns. *188. See cases collected in Ames, Cases on Torts (3rd ed.) 408-409; (2) Words which charge the plaintiff with having a loathsome disease, Williams *v.* Holdredge (N. Y. 1854) 22 Barb. 396; (3) Words which disparage the plaintiff in his trade, business, office, or profession. Secor *v.* Harris (N. Y. 1854) 18 Barb. 425; Jones *v.* Littler (1841) 7 M. & W. *423; Booth *v.* Arnold [1895] 1 Q. B. 571; Nicholson *v.* Dillard (1911) 137 Ga. 225, 73 S. E. 382; *cf.* Jones *v.* Jones [1916] 2 A. C. 481; (4) Words which impute unchastity or adultery to any woman or girl. Words of this character were not actionable *per se* at common law, Pollard *v.* Lyon, *supra,* but have been made actionable *per se* by statute in England, 54 & 55 Vict. c. 51, and in some American states, N. Y. Laws 1871, c. 219; see Newell, Slander & Libel (3rd ed.) 178. Several American courts have declared words of this character to be actionable *per se* in the absence of a statute. Cushing *v.* Hederman (1902) 117 Iowa 637, 91 N. W. 940; Barnett *v.* Ward (1880) 36 Oh. St. 107; Battles *v.* Tyson (1906) 77 Neb. 563, 110 N. W. 299. See Newell, Slander and Libel (3rd ed.) 180. "But in all cases of slander not included in any of the above classes . . . proof of special damages is essential to the cause of action." Odgers, *op. cit.,* 377.

[41]"Libel is in all cases actionable *per se;* but slander is not actionable without proof of special damage, save in certain exceptional cases." Salmond, Torts (3rd ed.) 443. To the same effect see Pollock, Torts (8th ed.) 240. "Thus it is not necessary to prove special damage in any action of libel." Odgers, *op cit.,* 377. Thorley *v.* Lord Kerry (1812) 4 Taunt. 355. Sometimes the courts use the expression "libelous *per se*" to distinguish defamatory from non-defamatory statements. Thus, written words not defamatory on their face are said to be "not libelous *per se.*" Crashley *v.* Press Pub. Co. (1904) 179 N. Y. 27, 71 N. E. 258. It is submitted that without inuendo pointing out their defamatory meaning, such words are simply not libelous, and to describe them as being "not libelous *per se*" is apt to convey the erroneous impression that there are libels which are not actionable *per se.* Also an action on the case frequently lies for proved damages caused by publishing false non-defamatory statements. Ratcliffe *v.* Evans [1892] 2 Q. B. 524. These cases have sometimes been termed libels not actionable without proof of special damage. See Burdick, Torts (3rd ed.) §356, and cases cited. But it is a misnomer to apply the term libel to non-defamatory statements. Salmond, *op. cit.,* 407. "No action of libel or slander will lie for such words. But when a defendant either knows or ought to know that special damage will

states, a corporation is not responsible for slander uttered by its agent or servant unless expressly authorized or ratified,[42] whereas the corporation may be liable for the publication of a libel by its agent or servant although published in violation of actual instructions.[43]

It is commonly said that false defamatory words when spoken and heard by another, constitute a slander; if written, and published, a libel.[44] Ordinarily a libel is published by exhibiting to another the defamatory writing, picture, statue, effigy, or exposing to view any other mark or sign. Accordingly, when the New York operator receives from *A* and reads the written message containing defamatory matter about *C*, there is a publication of a libel by *A*.[45] Likewise, if the New York operator shows the writing to another this would constitute a republication of the libel by the operator.[46] When, however, the New York operator flashes to the Washington operator the content of the message, the written libel is not actually exhibited to the Washington operator, but the content of the written message is made known by means of sounds like the human voice.[47] Is this the publication of slander or libel? Certainly there is no libel if the defamatory matter has not been reduced to writing, or to some other permanent form; but once the defamatory matter is reduced to writing, or to some other permanent form, does the publication thereof require that the writing be seen by the third party? Suppose that *A* composed a libelous letter about *C* and read it

happen to the plaintiff if he writes or speaks certain words, and he writes or speaks those words, desiring and intending that such damage shall follow, or recklessly indifferent whether such damage follows or not, then, if the words be false, and if such damage does in fact follow directly from their use, an action on the case will lie." Odgers, *op. cit.*, 77. The terms "libel" and "slander" should be confined to defamatory statements. Whether a statement is defamatory depends upon whether it is calculated to bring another into hatred, ridicule, or contempt.

[42]Jackson *v.* Atlantic etc. R. R. (1911) 8 Ga. App. 485, 69 S. E. 919; 11 Columbia Law Rev. 371; see other cases cited in footnote 18, *supra.*

[43]Behre *v.* National Cash Register Co. (1896) 100 Ga. 213, 27 S. E. 986. See other cases cited in footnote 18, *supra.*

[44]Odgers, Libel and Slander (5th ed.) 1-7; Pollock, Torts (8th ed.) 239; Salmond, Torts (3rd ed.) 406.

[45]Monson *v.* Lathrop (1897) 96 Wis. 386, 71 N. W. 596.

[46]Odgers, Libel and Slander (5th ed.) 166.

[47]If the message were recorded in writing in Washington by means of a telautograph or similar instrument and seen by the Washington operator, clearly there would be a publication of a libel.

aloud to *B*, a blind man.[48] Is this not making known the content of the written instrument?

As long ago as Coke's time it was held in *The Case De Libellis Famosis*[49] that a "libel may be published, 1. *Verbis aut cantilenis;* as where it is maliciously repeated or sung in the presence of others. 2. *Traditione*, when the libel or any copy of it is delivered over to scandalize the party." In *John Lamb's Case*[50] it was said that where one knowing a writing to be a libel "repeats it, or any part of it in the hearing of others, or after that he knows it to be a libel, he reads it to others, that is an unlawful publication of it." There is scant authority on the point in the modern English reports.[51] However, in *Forrester* v. *Tyrrell*[52] the point was made by counsel for the defendant that reading aloud a defamatory letter was the publication of slander and not libel. But the Court of Appeal held it was the publication of a libel, citing no other authority than *The Case De Libellis Famosis* and *John Lamb's Case.* The doctrine of these cases, moreover, is accepted by Odgers as representing the English law.[53] The same view has prevailed in the several American cases in which the point was involved, and no case to the contrary has been found in the books.[54] On the authority of these cases it is submitted that when the New York operator flashes to the Washington operator the content of the written message containing defamatory matter about *C*, the publication by the New York operator is one of libel. If, however, the decisions cited are not conclusive, there remains another factor in the telegraph case to

[48]A similar question is propounded but not answered by Sir Frederick Pollock in his work on Torts (8th ed.) 239, footnote (*b*). "Quære, whether defamatory matter recorded on a phonograph would be a libel or only a potential slander."

[49](1610) 5 Co. Rep. *125*a*, 77 Eng. Reprint 250.

[50](1610) 9 Co. Rep. *59*b*, 77 Eng. Reprint 822.

[51]That the publication was one of libel was assumed but not discussed in Hearne *v.* Stowell (1840) 12 A. & E. 719.

[52](1893) 9 T. L. R. 257.

[53]Odgers, Libel and Slander (5th ed.) 158, 165.

[54]VanCleef *v.* Laurence (N. Y. 1817) 2 City Hall R. 41; McCoombs *v.* Tuttle (Ind. 1840) 5 Blackf. 431; Snyder *v.* Andrews (N. Y. 1849) 6 Barb. 43; Adams *v.* Lawson (Va. 1867) 17 Grat. 250; Miller *v.* Donovan (1896) 16 Misc. 453, 39 N. Y. Supp. 820. In Snyder *v.* Andrews, *supra,* it was held that where the defendant who had written a libelous letter to the plaintiff read it aloud to another before sending it, he published a libel. In Adams *v.* Lawson, *supra,* it was held that where defendant told another the content of a defamatory letter which he had previously written and sent to the plaintiff, this was the publication of a libel, citing John Lamb's Case, and the Case De Libellis Famosis.

be reckoned with. As the message comes over the wires it is reduced to writing by the Washington operator. It is communicated by the New York operator intending that it shall be reduced to writing by the Washington operator. The Washington operator necessarily sees the written message as he writes it. Are these facts of any importance? A somewhat similar situation is presented in the stenographer cases. When a defamatory letter is dictated orally to a stenographer there is obviously a publication of slander. Is that all? As distinguished a writer as Mr. Odgers has questioned the decision in *Pullman* v. *Hill & Co.* for holding there was a publication of a libel. In his work on Libel and Slander he writes:

"It is doubtful whether the facts as proved at the trial in *Pullman and another* v. *Hill & Co.* support the decision of the Court of Appeal on the issue of publication. Dictating to a shorthand clerk words which that shorthand clerk takes down in writing is not publishing a libel to the shorthand clerk. No libel is yet in existence. Such dictation may be actionable slander—indeed, in *Pullman and another* v. *Hill & Co.* it was so, but the fact that spoken words are intended to be written down after they are uttered does not make their utterance the publication of a libel. Then, again, after the spoken words were taken down in shorthand, and copied out in typewriting, the manager signed the typewritten document and handed it to the office boy to be press copied. Is this a publication? Apparently the attention of the Court was not called to the fact that press-copying is purely a mechanical process. The office boy would not read a word of the letter. Surely there was no publication by the manager to the office boy, unless the latter made himself acquainted with the contents of the document which was handed to him."[55]

Mr. Odgers does not mention the fact that as the spoken words were copied out in typewriting by the stenographer at the request of the defendant, the stenographer must necessarily have seen the written letter—at least there was sufficient evidence to justify a jury in so finding. A strong argument in support of *Pullman* v. *Hill & Co.* may be based on this fact. If *A* writes a libelous letter concerning *C* and shows it to *B*, there is certainly a publication of a libel by *A*. Likewise, if *A* requests *X* to write the letter for him and *A* permits *B* to see it, there is a publication of a libel for which *A* is responsible. Should it make any difference if *X* who writes the letter at *A's* request is the person who is permitted to see it after it is written? So far as *C's* reputation is concerned it would seem to make little difference whether the

[55]Odgers, Libel and Slander (5th ed.) 161.

person who sees the letter is the same person whom *A* procured to write it, or is a stranger. And so there is authority for the proposition that if *A* and *B* together compose a libelous letter concerning *C*, although the letter is actually written by *B*, and the letter is sent to *C*, *C* may sue both *A* and *B* for the publication of a libel because each is responsible for the publication to the other.[56] Similarly, when the stenographer at the request of the author reduces the defamatory words to writing and is permitted by the author to see the written libel, there is a publication of a libel as well as slander, and so the courts have held.[57]

In *Peterson* v. *Western Union Telegraph Co.*[58] it was seriously contended by counsel for the telegraph company that the only publication was one of slander, but the court held there was a publication of a libel.[59] This is the only telegraph case in which the point has been raised, but it is believed that the decision in this case is sound and will be followed should the question again be presented for decision.

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[56]Miller *v.* Butler *et al.* (Mass. 1850) 6 Cush. 71.

[57]Gambrill *v.* Schooley (1901) 93 Md. 48, 48 Atl. 730; Sun Life Assur. Co. *v.* Bailey (1903) 101 Va. 443, 44 S. E. 692; Ferdon *v.* Dickens (1909) 161 Ala. 181, 49 So. 888; Moran *v.* O'Regan (1907) 38 N. B. Rep. 189; Puterbaugh *v.* Gold Medal Mfg. Co. (1904) 7 Ont. Law Rep. 582.

[58](1898) 72 Minn. 41, 74 N. W. 1022.

[59]The argument of the Court on this point is interesting: (p. 43) "Whether the means employed by the operator at New Ulm in dictating or communicating the contents of the message to the operator in St. Paul consisted of sounds representing letters, or dots or dashes representing the same thing, can make no difference. In either case, the purpose and result would be the same, viz., the transmission and copying in written form the contents of the written message in the hands of the operator in New Ulm. The result was to put the message in the hands of the St. Paul operator in written, durable form, which he could read and understand as effectually as if the original had been placed in his possession. Words communicated for such an accomplished purpose 'have an existence *per se* off the tongue.'

"When the means of reproducing the contents of a writing are by repeating its contents orally to another, to enable him to put it into writing, and the person to whom it is repeated reduces it to writing, the writing thus produced does not depend for its identification on the oral utterances of the person who reads or repeats, but on the writing itself, which is thus communicated to the person who reduces it to writing; and it can make no difference whether the contents of the writing are communicated by sound over telegraph wires or by one operator to another or by a person in audible words to an amanuensis at his side. See Pullman *v.* Hill [1891] 1 Q. B. D. 524; McCoombs *v.* Tuttle, 5 Blackf. 431; Adams *v.* Lawson, 17 Grat. 250. As long ago as Lamb's Case, 9 Coke, 59*a*, it was held that where one knowing a writing to be a libel 'reads it to others that is an unlawful publication of it'; and in 'The Case De Libellis Famosis,' 5 Coke, 124*b*, it was held 'that a libel may be published (1) *verbis aut cantilenis*, as where it is maliciously repeated or sung in the presence of others.' It is not necessary to go as far as this in order to hold that the facts in the present case constituted the publication of a libel."

In the cases considered so far the written message received and transmitted by the telegraph company was obviously defamatory on its face. Suppose, however, that the defamatory message is delivered to the telegraph company in terms of a secret code, or a foreign language, or is written in English but the words are ambiguous, or else their defamatory meaning is dependent upon extraneous facts. Is the transmission of the message under these circumstances a publication?

The leading case on innocent dissemination of defamatory matter is *Emmens* v. *Pottle,*[60] in which case the English Court of Appeal held that news-venders who sold and delivered a newspaper containing a libel, of which they were ignorant, and were not negligent in failing to detect it, had not published a libel.[61] On the other hand, in *Vizetelly* v. *Mudie's Select Library, Limited,*[62] the same court held that the defendants, who operated a circulating library, were responsible for circulating a book containing a libel on the plaintiff, although the defendants were ignorant of the existence of the defamatory matter, where the jury had found the defendants were negligent in not detecting the libel. In both cases the defendants by their conduct actually caused the defamatory matter to be made known. But the law does not regard one as the legal cause of every consequence of one's act. It may well be, therefore, that for an innocent, non-negligent dissemination of defamatory matter one should never be responsible, so there is said to be no publication; whereas, for a wilful or careless dissemination, one should ordinarily be responsible, and consequently there is said to be a publication,[63]

[60](1885) 16 Q. B. D. 354.

[61]*Accord,* Ridgway *v.* W. H. Smith & Son (1890) 6 T. L. R. 275; Mallon *v.* W. H. Smith & Son (1893) 9 T. L. R. 621; Martin *v.* Trustees (1894) 10 T. L. R. 338. In Day *v.* Bream (1837) 2 M. & R. 54, it was held that a porter who in the course of his business delivers parcels containing libelous handbills is not liable in an action for a libel, if he be shown to be ignorant of the contents of the parcels.

[62][1900] 2 Q. B. 170.

[63]Such a distinction is in complete harmony with the doctrine of unavoidable accident in the law of torts. If A shoots at a bird and the bullet glances and strikes B, certainly B's injury is the actual result of A's act. Should A be held responsible? The answer to this question involves other considerations. According to primitive law A would, perhaps, be responsible irrespective of fault. See Professor Wigmore's article on "Responsibility for Tortious Acts", 7 Harvard Law Rev. 315, 383, 441. Today A would not be responsible unless his conduct bore the taint of culpability. Stanley *v.* Powell [1890] 1 Q. B. D. 86; Brown *v.* Kendall (Mass. 1850) 6 Cush. 292; Morris *v.* Platt (1864) 32 Conn. 75. According to the English decisions proof of A's act in firing the gun with

although the presence of special circumstances (a privileged occasion) may justify a wilful dissemination. Publication is here used by the courts to denote those circumstances under which one, who by his conduct has caused defamatory matter to be made known, is legally responsible in the absence of privilege. No case has been found which runs counter to the rule laid down in *Emmens* v. *Pottle*. It is, therefore, reasonable to assume that where a telegraph company through its duly authorized servants transmits a message which on its face is not defamatory, and the company's servants cannot be charged with knowledge of other facts which give to the message a defamatory meaning, and are not negligent in failing to detect the defamatory meaning, there is no publication by the company.

Is there a publication if the message is ambiguous, and the words are defamatory according to one interpretation, but are not defamatory according to another interpretation? In the ordinary case where *A* publishes words of this character, if the court decides that the words are fairly susceptible of the defamatory meaning alleged, it is a question for the jury which of the two meanings was intended.[64] Certainly if the operator knows at the time he transmits the message that the defamatory meaning is intended, and the words are so understood by the person to whom they are communicated, there is a publication by the company. But ordinarily a telegraph operator who receives a message for transmission is in no position to ascertain which of two meanings is intended. Furthermore, it should be remembered that a telegraph company by virtue of its public duties is bound to transmit promptly a message expressed in decent language. "In such a case the operator cannot wait to consult a lawyer, or forward the message to the principal office for instruc-

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the resulting injury to B would make out a *prima facie* case of trespass; but if it appeared that A neither intended the consequences to B, nor was negligent toward B in firing the gun, A would escape responsibility. Stanley *v.* Powell, *supra.* Is this not the idea behind Lord Esher's statement in Emmens *v.* Pottle (1885) 16 Q. B. D. 354, "That the defendants are *prima facie* liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to show some circumstances which absolve them from liability, not by way of privilege, but facts which show that they did not publish the libel."

[64]Sanderson *v.* Caldwell (1871) 45 N. Y. 398. "If the language is unambiguous, whether it is actionable becomes a question of law; but if ambiguous and capable of an innocent, as well as of a disgraceful meaning, the question becomes one for the jury to settle". Per Gray, J., in Morrison *v.* Smith (1904) 177 N. Y. 366, 369, 69 N. E. 725.

tions. He must decide promptly, and forward the message without delay, if it is a proper one, and for any honest error of judgment in the premises the telegraph company cannot be held responsible."[65] There are two decisions directly in point.

In *Grisham* v. *Telegraph Co.*[66] the facts were that the defendant received and transmitted the following telegram:

"7—5—1907.

To Silver Burdett & Company,
378 Wabash Avenue, Chicago.

Board here sold out Memphis Saturday morning Dockery Hotel Kirksville Saturday night.

(Signed) W. H. M."

The plaintiffs, who were members of the board referred to in the telegram, brought an action against the telegraph company for libel. The case was tried before a jury. At the close of the plaintiff's evidence showing the defamatory meaning of the words the court sustained a demurrer, and directed a verdict for the defendants. On appeal the judgment was affirmed, the court declaring:

"There is no proof that Beer [defendant's operator] knew that the board was in session that day as a text book commission for the purpose of receiving bids, or that any agents appeared before that commission. It cannot be presumed that he read in the newspaper a notice addressed to publishers of text books. There is no proof that he knew that the expression 'board here sold out' meant that the school board had been bribed. There is no evidence of any communication to him, or of any knowledge conveyed to him in any manner, aside from the telegram itself, which would explain the meaning of these words. If there was ambiguity in the language, it was still his duty to send the message without investigation. Under the law it is the duty of the agent to send the message, if it is expressed in decent language, on payment or tender of the charge. (W. U. Tel. Co. v. Ferguson, 57 Ind. 495; Gray v. W. U. Tel. Co., 87 Ga. 350; Commonwealth v. W. U. Tel. Co., 112 Ky. 355.)"[67]

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[65]Quoted from the decision in Peterson *v.* Western Union Tel. Co. (1896) 65 Minn. 18, 22. To the same effect, the Supreme Court of Georgia in Gray *v.* Western Union Tel. Co. (1891) 87 Ga. 350, 13 S. E. 562, declared that "when a dispatch is ambiguous, the law would give the benefit of the ambiguity to the company in dealing with it either civilly or criminally, and hence, it would be the duty of the company, in deciding whether to transmit it or not, to give the benefit of the doubt to the sender. On no other rule would it be practicable for telegraph companies to perform their legitimate functions as servants of the general public."

[66](1911) 238 Mo. 480, 142 S. W. 277.

[67]*Ibid.*, at p. 491.

In *Stockman* v. *Western Union Telegraph Co.*[68] it appeared that an ambiguous message was transmitted by the telegraph company. In an action for libel brought against the company the evidence showed that at the time the message was tendered "the operator raised some question as to the meaning of the objectionable word, and was told by the sender, who was a stranger to him, that it meant 'cunningness,' and that it was 'all right' and to 'just send it.'" A demurrer to the evidence was sustained and a judgment for the defendant was affirmed on appeal, the court declaring:

"The telegraph company had no right to assume that the words meant something not apparent on their face. The plaintiff's petition and evidence failed to charge the defendant with any further or other knowledge of the character of the communication than appeared upon its face."[69]

It would seem from these cases that where the message is ambiguous, the transmission of the message by the servants of the company in ignorance that the defamatory meaning is intended is not a publication by the company. Should the result be any different if the defamatory message is written in a foreign language not understood by the company's operator? No case in point has been found, but it is believed that the result would be the same. The common practice of transmitting cipher messages is a close analogy. Furthermore, it would be an unreasonable burden upon a telegraph company operating in this country to require that it maintain an interpreter at every office to translate messages written in a foreign language, and it would be an unnecessary inconvenience to the many foreigners residing in this country to require all messages to be written in English.

It remains to be considered under what circumstances a publication by transmission of a defamatory message is privileged.

(To be concluded.)

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[68] (Kan. 1900) 63 Pac. 658.

[69] *Ibid.*, at p. 659.